LEGAL ETHICS.—The New York County Lawyers' Association Committee on Professional Ethics has recently embarked upon a new and interesting line of work. It has announced to the members of the bar of New York County that it stands ready "to advise inquirers respecting questions of proper professional conduct." The answers to questions submitted for its consideration are published for circulation among the bench and bar of New York City. The committee, through the courtesy of its chairman, Charles A. Boston, Esq., has extended to the LAW REVIEW the privilege of publishing, from time to time, the inquiries submitted and answers thereto,—a privilege of which the LAW REVIEW is glad to take advantage.

Following are three questions recently propounded to the committee:

"1. Is an attorney entitled to retain moneys in payment of disbursements when said moneys were received by him in another matter in which he appeared as attorney for the same client, and assuming that the client has not agreed to allow the attorney to retain same?

2. Is an attorney entitled to retain moneys expended for disbursements, which moneys were received in the same matter in which the disbursements were had?

3. Where the original matter in which the expenses are made is one involving a collection, and something is received by the attorney, is he entitled to retain what he has received on account of disbursements had therein?"

To these questions the committee replied:

"*Resolved,* That in the opinion of the committee in each case suggested, the attorney is entitled to retain the amount of money so expended for disbursements, but subject, in case of objection by the client, to a judicial determination of the reasonableness and propriety of the disbursements and the right of the attorney to so apply the moneys; but that the attorney should not make such an application of the withheld funds for his own purposes as to preclude or endanger their return in whole or in part if the question be determined against him by a competent court."

PROPERTY—POLLUTION OF WATERS AND WATER COURSES BY MINE OWNERS.—In Arminius Chemical Co. v. Landrum,[1] the Supreme Court of Virginia added its voice to the chorus of disapprobation which has greeted the case of Pennsylvania Coal Co. v. Sanderson[2] whenever courts other than those of Pennsylvania have been asked to apply the principles of that decision to cases before them. In the Virginia case the defendant companies were engaged in producing iron pyrites, the separation of which from the refuse at the mine required that the ore be washed with large

[1] 73 S. E. Rep. 459 (1912).
[2] 113 Pa. 126 (1886).

quantities of water. The water used in the washing became impregnated with sulphuric acid and solid matter. The water was permitted to flow into a stream, which in turn flowed through the plaintiff's farm land. The noxious substances in the water rendered it unfit for farm purposes and destroyed the fertility of some thirty acres of land. An action of trespass on the case being brought, the appellate court affirmed a judgment for the plaintiff on the ground that lower riparian owners are possessed of the right to have the stream flow to them substantially preserved in its original quantity and purity, and that no exception to this right exists in favor of upper mine owners whose mines are so situated that a pollution of the stream is a necessary incident to their operation.

The case of Pennsylvania Coal Co. v. Sanderson [3] has been the subject of so much controversy and criticism that it is unnecessary to repeat the facts or the decision in detail. After holding on three appeals that a right of action lay, the Supreme Court of Pennsylvania, on the fourth appeal, held that a lower riparian owner had no recourse against the owner of a mine further up the stream who pumped aciduated water from his mine and permitted it to flow into the stream so that it became unfit for domestic or other use. The mining of coal was held a natural use of the land, and the injury necessarily caused to a lower owner was *damnum absque injuria.* The ordinary rights of riparian owners had *ex necessitate* to give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

This case has not been followed in any other jurisdiction even in those where the mining interests rival those of Pennsylvania, *e. g.* Ohio [4] and West Virginia.[5] Even in Pennsylvania the case has been restricted to its exact facts,[6] and wherever the case has been cited elsewhere the courts have repudiated it in no uncertain terms. The other courts are unanimous in saying that the necessities of the mining business furnish the sole excuse for the Sanderson decision, and they decline to adopt any rule "whereby the necessities of one man's business can be made the standard by which to measure another man's rights in a thing which belongs to both." [7]

The reasons adverse to the Sanderson case as outlined in various cases are as follows: There exists at common law a right inherent in the ownership of property along a natural stream to have the water transmitted without sensible alteration in quality or unrea-

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[3] *Supra.*

[4] Columbus, Etc., Co. v. Tucker, 48 Ohio, 41 (1891).

[5] Day v. Louisville Coal and Coke Co., 60 W. Va. 27 (1907).

[6] Williams v. Union Imp. Co., 1 Pa. Dist. Rep. 288 (1892).

[7] Strobel v. Kerr Salt Co., 164 N. Y. 303 (1900); Coal Co. v. Ruffner, 100 S. W. Rep. 116 (Tenn., 1907).

sonable diminution in quantity.[8] Any act of others which tends to infringe this right is a trespass for which an action for damages will lie, and an injunction may issue if the acts are repeated. When the infringements are occasioned by actions of an upper riparian owner the maxim *"Sic utere tuo ut alienum non laedas"* is applied.[9] These rules are not to be relaxed even in favor of business interests engaged in developing the resources of the country.[10] This reasoning is especially applicable in America, in view of the constitutional provisions prohibiting the taking of private property for public uses without making just compensation. *A fortiori* if private property may not be taken for purely public uses it cannot be taken for private purposes.[11]

The reasoning of the court in the Sanderson case was that the rights of the lower riparian owner was to have the water come to him only as affected by the natural user of his property by the upper owner. This idea of "natural" user was borrowed from the opinion of Lord Cairns in Bylands v. Fletcher,[12] but it is submitted that an application of the true principles of Bylands v. Fletcher would have induced a different decision. Admitting that the mining of coal is a "natural" use of the land,[13] which is denied in some cases [14] none the less, the collection of large quantities of aciduated water, and the pumping of it from the bottom of the mine into a stream, are "non-natural" uses with the meaning of the words as used by Lord Cairns.

Lord Shand criticises the Sanderson case most ably in Young v. Banking Distillery Co.,[15] where he says: "While the enormous value of the mining interests in the district of Pennsylvania from which the case came might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceedings by interdict at the instance of surface proprietors and to confine them to a right to damages only for injury sustained; that value could in my opinion afford no good legal ground for allowing the proprietor of a mine to work his minerals for his own profit so as to destroy or greatly injure his neighbor's estate by subjecting it, by means of artificial operations, to the burden of receiving water

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[8] Fletcher v. Smith, L. R. 2 App. Cas. 781, Eng. (1877).

[9] Lawson v. Price, 45 Md. 123 (1876); Tenn. Coal Co. v. Hamilton, 100 Ala. 252 (1893).

[10] Robinson v. Black Diamond Mining Co., 50 Cal. 461 (1875); Yuba County v. Cloke, 79 Cal. 239 (1899); Pennington v. Brinsop Hall Coal Co., L. R. 5, Ch. Div. 569 (1877).

[11] Townsend v. Norfolk Ry. Co., 105 Va. 22 (1906); Beach v. Sterling Iron Co., 54 N. J. Eq. 65 (1895); Shoffner v. Sutherland, 111 Va. 298 (1910).

[12] 3 H. L. 330 (1865).

[13] Iron Co. v. Kenyon, L. R. 11, Ch. Div. 783 (1876).

[14] Columbus, Etc., Co., v. Tucker, 48 Ohio, 41 (1891); Beach v. Sterling Iron Co., 54 N. J. Eq. (1895).

[15] 1 App. Case. 641 (1893).

enlarged in quantity and destroyed in quality without compensation or damages for the injury done."

The decision is also open to criticism from an economic viewpoint. No enterprise or business is profitable to the community as a whole which is unable to pay its own way. If therefore a coal mine cannot produce more wealth than it destroys it should not be operated. If it does produce a surplus of wealth there is no reason for removing the burden of the value destroyed from the persons who receive direct benefits in the shape of profits and placing them upon an individual to whom any benefit accruing comes merely because he is a member of society. In fact, the Virginia case holds that the benefits resulting to the plaintiff from an increase in the value of the rest of his land due to the increase in population attracted by the mines may not be taken into account in assessing the damages, and in this it follows other cases.[16]

L. P. S.

TRUSTS—ASSIGNMENT OF CHOSES IN ACTION.—Where several assignees of portions of a legatee's interest under a will are competing for payment, that one will have priority whose assignment was first brought to the knowledge of the trustee, though the assignment was actually made later than that to another claimant, if he took in good faith and without knowledge of the earlier assignment.[1]

The question involved is whether the assignee who was first in point of time, but not in giving notice to the trustee, is by that fact, and that alone, to be made subsequent in payment to the assignee whose claim was first brought to the trustee's attention. The ground on which the decision in the present case is based is that the first assignee in point of time has been negligent in not notifying the trustee, and has thus made it easy for the assignor to commit fraud on an innocent third person by a subsequent assignment to him of the same interest. Consequently, the assignor, and not the later assignee, who has no knowledge of the prior transaction, must stand the loss.

There are two general views on this subject; one—that of the present case, which obtains in England, Pennsylvania, and some other states; and the other—that priority in time of assignment controls, and notice to the trustee is not necessary to protect the assignee's rights. The leading case adopting the first theory is that of Dearle v. Hall,[2] decided in England in 1828. Brown was entitled to an annuity, which he assigned by way of collateral security to

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[16] Francis v. Schoelkopf, 53 N. Y. 152 (1873); Marcy v. Fries, 18 Kan. 353 (1877).

[1] Jenkinson v. New York Finance Co., 82 Atl. Rep. 36 (N. J. 1911).

[2] 3 Russ. 1.